THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

September 26, 1990

Honorable Ron Wilson
State Representative District 131
House of Representatives
P. O. Box 2910
Austin, Texas 78769

LO-90-64

Dear Representatives Wilson:

Your recent letter to us requests an opinion about the practice of using "volunteer" prison inmates as the subject of tracking exercises and as participants in fights with packs of dogs. We have not located any statute which deals directly with this issue, but we will briefly discuss a number of statutes which may have some bearing on your concerns.

A civil statute, now codified as section 500.002 of the Government Code, provides:

> If an employee of the department [of Criminal Justice] commits an assault on an inmate, the director shall file a complaint with the proper official of the county in which the offense occurred. If an employee is charged with an assault described by this section, an inmate or person who was an inmate at the time of the alleged offense may testify in a prosecution of the offense.

"Assault" is described in chapter 22 of the Penal Code, which states:

> (a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

(b) An offense under Subsection (a)(1) of this section is a Class A misdemeanor unless:

(1) the offense is committed by the owner or an employee of an institution described in Subsection (a), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1953, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at an institution described in that subsection, and the offense is committed by causing bodily injury to a patient or resident of an institution described in that subsection, in which event the offense is a felony of the third degree; or

(2) the offense is committed by the owner or employee of a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in Subsection (a)(6), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1953, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in that subsection, and the offense is committed by causing bodily injury to a patient or resident of a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in that subsection, in which event the offense is a felony of the third degree.

(c) An offense under Subsection (a)(2) of this section is a Class C misdemeanor unless:

(1) the offense is committed by the owner or an employee of an institution described in Subsection (a), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1953, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at an institution described in that subsection, and the offense is committed by threatening a patient or resident of an institution described in that subsection with bodily injury, in which event the offense is a Class B misdemeanor;

(2) the offense is committed by the owner or an employee of a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in Subsection (a)(6), Section 2, Chapter 413, Acts of the 53rd Legislature, Regular Session, 1953, as amended (Article 4442c, Vernon's Texas Civil Statutes), or a person providing medical or psychiatric treatment at a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in that subsection, and the offense is committed by threatening a patient or resident of a facility, except a facility operated by the Texas Youth Commission or the Texas Department of Corrections, described in that subsection with bodily injury, in which event the offense is a Class B misdemeanor;

(3) the offense is committed against a classroom teacher, counselor, principal, or other similar instructional or administrative employee of a primary or secondary school accredited by the Texas Education Agency while engaged in performing his educational duties, in which event the offense is a Class B misdemeanor; or

(4) the offense is committed against a family member and the actor has been previously convicted under this section for an offense against a family member:

(A) one time, in which event the offense is a Class B misdemeanor;

> (B) two time, in which event the offense is a Class A misdemeanor; or
>
> (C) more than two times, in which event the offense is a felony of the third degree.

The rather byzantine language of subsection (b)(2) and (c)(2) would appear to mean that an assault by an employee of the Department of Criminal Justice, is governed, for punishment purposes, by the regular provisions of subsections (b) and (c), i.e., such an assault is a Class A misdemeanor if committed by causing bodily injury (subsection (a)(1)) and a Class C misdemeanor if there is merely a threat (subsection (a)(2)).

Section 22.05 of the Penal Code describes the offense of "reckless conduct" and makes it a Class B misdemeanor:

> (a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.
>
> (b) Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded.
>
> (c) An offense under the section is a Class B misdemeanor.

The problem with either the assault or reckless conduct approach is, or course, that section 22.06 of the Penal Code makes consent a defense to assault:

> The victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under Section 22.01 (Assault), 22.02 (Aggravated Assault), or 22.05 (Reckless Conduct) of this code if:
>
> (1) the conduct did not threaten or inflict serious bodily injury; or
>
> (2) the victim knew the conduct was a risk of;
>
> (A) his occupation;
> (B) recognized medical treatment; or

> (C) a scientific experiment conducted by recognized methods.

It is doubtful that an inmate fits within one of the three categories of subsection (2) since it seems unlikely the exercises constituted "a scientific experiment conducted by recognized methods" or that the victim's "occupation" was that of "inmate."

Another statute, codified as section 39.021 of the Penal Code, also fails to offer much assistance. That statute provides:

> (a) A jailer or guard employed at a municipal or county jail, by the Texas Department of Corrections, or by a correctional facility authorized by Article 5115d, Revised Statutes, or Article 6166g-2, Revised Statutes, or a peace officer commits an offense if he:
>
> (1) intentionally subjects a person in custody to bodily injury knowing his conduct is unlawful;
>
> (2) willfully denies or impedes a person in custody in the exercise or enjoyment of any right, privilege, or immunity knowing his conduct is unlawful.
>
> (b) An offense under this section is a felony of the third degree. An offense under this section is a felony of the second degree if serious bodily injury occurs or a felony of the first degree if death occurs.
>
> (c) This section shall not preclude prosecution for any other offense set out in this code.
>
> (d) The Attorney General of Texas shall have concurrent jurisdiction with law enforcement agencies to investigate violations of this statute involving serious bodily injury or death.
>
> (e) In this section, "custody" means the detention, arrest, or confinement of a person.

The impediment here is that your questions focus upon prison officials and private individuals rather than on guards. Furthermore, it seems doubtful that, given the possible inapplicability of the assault statutes, a guard would know that his conduct was unlawful.

The most promising avenue would appear to be the use of section 39.02 of the Penal Code, which declares, in pertinent part:

> (a) A public servant acting under color of his office or employment commits an offense if he:
>
> (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
>
> (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or
>
> (3) intentionally subjects another to sexual harassment.

An offense under section 39.02 is a Class A misdemeanor. Whether the language "that he knows is unlawful" refers to "mistreatment" as well as to the other prohibitions in subsection (a)(1), we cannot determine here. Even if it does not refer to "mistreatment," however, a defendant might well argue that "mistreatment" is unconstitutionally vague. Section 39.02 would be most effective at remedying the situation you present if the legislature were to enact a statute prohibiting any individual or public official from using inmates in dog tracking or dog fighting exercises.

We note, with some irony, that section 42.11 of the Penal Code states that an individual commits an offense if he "intentionally or knowingly . . . (6) causes one animal to fight with another; or (7) uses a live animal as a lure in dog race training or in dog coursing on a racetrack." An

offense under this section is a Class A misdemeanor. In any event, we hope that this discussion will be useful to you in preparing legislation.

Yours very truly,

Rick Gilpin
Chairman
Opinion Committee

RG/lcd

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